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To be argued by
WILLIAM J. JUNKERMAN

FILED
NOV 7
JOHN T. FEY, Clerk

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

RUTH M. NOEL and WM. H. FRANTZ, Executors of the Estate of Marshal L. Noel, Deceased,

Plaintiffs-Appellants,

—against—

LINEA AEROPOSTAL VENEZOLANA,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

APPELLEE'S [redacted] APPENDIX

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Defendant-Appellee

WILLIAM J. JUNKERMAN
DOUGLAS B. BOWRING
Of Counsel

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Order Entered on Motion to Dismiss Original Complaint as Orally Amended

(52)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

RUTH NOEL,

Plaintiff,

—against—

LINEA AEROPOSTAL VENEZOLANA,

Defendant.

Defendant having moved this Court for an order dismissing the complaint upon the ground that the court lacks jurisdiction of the subject matter of the suit as a civil action and upon the further ground that such a suit may only be brought by the personal representative of the decedent in a district court of the United States in admiralty, for the exclusive benefit of the decedent's next of kin and said motion having duly come on to be heard before this Court on July 31, 1956,

Now, on reading defendant's notice of motion, dated July 25, 1956, and the complaint herein in support of defendant's motion, and the affidavit of Morris L. Weisberg, Esq., sworn to the 6th day of August, 1956, in opposition thereto, and after hearing Haight, Gardner, Poor & Havens (William J. Junkerman, Esq., of counsel) in support of said motion, and Messrs. Harry Norman Ball, Joseph G. Feldman, and Lipper, Shinn & Keeley (Morris L. Weisberg, Esq., of counsel) in opposition thereto, and plaintiff, upon the argument of said motion, having amended her complaint with the consent of defendant's

Order Entered on Motion to Dismiss Original Complaint as Orally Amended

counsel, and the court having considered such amendment as a part of plaintiff's opposition (53) to said motion, and due deliberation having been had thereon, and the court having made and filed its decision on August 22, 1956, it is, on motion of Haight, Gardner, Poor & Havens, attorneys for defendant,

ORDERED, that defendant's motion to dismiss the complaint upon the ground that this Court does not have jurisdiction of the subject matter of the suit as a civil action, be and the same hereby is granted without prejudice to plaintiff's right to institute a suit in admiralty against defendant within the time limited by law.

Dated: New York, N. Y., September 19th, 1956.

JOHN W. CASHIN
U. S. D. J.

Sept. 19, 1956

Judgment Entered

HERBERT A. CHARLSON
Clerk

Notice of Entry Endorsed on Initial Order

(54(a))

PLEASE TAKE NOTICE that an Order and Judgment of which the within is a copy, was this day duly entered and filed in the within entitled action in the office of the Clerk of the U. S. District Court for the Southern District of New York, in the U. S. Courthouse at Foley Square, in the Borough of Manhattan in the City of New York.

Dated, New York, Sept. 19, 1956

Yours, &c.,

HAIGHT, GARDNER, POOR & HAVENS,
Attorneys for Defendant,
Office and Post Office Address:
80 Broad Street,
Borough of Manhattan,
New York 4, N. Y.

To

LIPPER, SHINN & KEELEY,
Attorneys for Plaintiff,
527 Fifth Avenue,
New York 17, N. Y.

AFFIDAVIT OF SERVICE BY MAIL, ANNEXED TO INITIAL ORDER WITH NOTICE OF ENTRY

(54)

State of New York,
County of New York—ss.:

GEORGE J. BIERNESSER, being duly sworn deposes and says; that on the 21st day of September 1956, he served the annexed order with Notice of Entry upon Lipper, Shinn & Keeley, 527 Fifth Ave., New York 17, N. Y., the attorney for the plaintiff named therein, by depositing a true copy thereof securely enclosed in a post-paid wrapper in a Post Office box regularly maintained by the United States Government, at No. 80 Broad Street, New York 4, N. Y., directed to said attorney at the above address, that being the last address within that State designated by said attorney on the previous papers in this action as the place where said attorney then kept an office for the regular transaction of business, between which places there then was and now is regular communication by mail. Deponent is over the age of 18 years.

GEORGE J. BIERNESSER

Sworn to before me this
21st day of September, 1956.

GEORGE H. HEARN
Notary Public

GEORGE H. HEARN
Notary Public, State of New York
No. 24-6824150
Qualified in Kings County
Cert. filed with New York Co. Clerk
Term expires March 30, 1958

(Seal)

Notice of Motion to Dismiss the Amended Complaint

(23)

[SAME TITLE]

Sirs:

PLEASE TAKE NOTICE that the defendant will move this Court at a Stated Term thereof for the hearing of motions, to be held on Room 506 of the United States Court House at Foley Square in the Borough of Manhattan, County, City and State of New York, on the 25th day of September, 1956, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order,

(1) Dismissing the amended complaint herein bearing the caption:

"IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

RUTH M. NOEL and WM. H. FRANTZ, Executors of the Estate of Marshal L. Noel, Deceased,
Plaintiffs,

—against—

LINEA AEROPOSTAL VENEZOLANA,
Defendant"

Civil Action No. 110–338
(Jury Trial Demanded)

pursuant to Rule 12 of the Rules of Civil Procedure upon the ground that this Court lacks jurisdiction over the subject matter of such a suit brought as a civil jury action.

(24)

PLEASE TAKE FURTHER NOTICE that upon the annexed affidavit of William J. Junkerman, sworn to the 13th day of

September, 1956, the defendant will further move this Court at the same time and place as specified above for an order

(2) Dismissing said amended complaint upon the ground that it was not served in compliance with Rule 15(a) of the Rules of Civil Procedure;

(3) Dismissing said amended complaint pursuant to Rule 56 of the Rules of Civil Procedure upon the ground that the issues therein contained have already been decided by this Court adversely to the plaintiff in a decision in this action handed down by United States District Judge John M. Cashin, August 22, 1956, and that they are therefore *res adjudicata;* and

(4) Granting to defendant such other and further relief as to the court may seem just and proper.

PLEASE TAKE FURTHER NOTICE that answering affidavits, if any, are required to be served five (5) days before the return date of this motion.

Dated: New York, N. Y., September 13, 1956.

Yours, etc.,

HAIGHT, GARDNER, POOR & HAVENS
Attorneys for Defendant
80 Broad Street
New York 4, N. Y.

By WILLIAM J. JUNKERMAN
A Member of the firm.

To:

LIPPER, SHINN & KEELEY, ESQS.
Attorneys for Plaintiff
527 — 5th Avenue
New York, N. Y.

Affidavit of William J. Junkerman

(25)

[SAME TITLE]

State of New York,
County of New York—ss.:

WILLIAM J. JUNKERMAN, being duly sworn, deposes and says:

I am an attorney at law and a member of the firm of Haight, Gardner, Poor & Havens, attorneys for defendant in the above-entitled action, and as such I am familiar with all the pleadings and proceedings heretofore had herein. I make this affidavit in support of defendant's motion to dismiss the amended complaint herein pursuant to Rules 12 and 56 of the Rules of Civil Procedure and for the further reason that service of said amended complaint was not authorized under Rule 15(a) of the Rules of Civil Procedure.

This action was instituted by the service of a summons and complaint on July 9, 1956. Defendant moved to dismiss said complaint upon the ground that this Court lacks jurisdiction of such a suit brought as a civil jury action and upon the further ground that such a suit may only be brought by the personal representative of the decedent in a District Court of the United States, in admiralty, for (26) the exclusive benefit of decedent's next of kin. Said motion came on to be heard before Honorable John M. Cashin, one of the judges of this Court, at a Stated Term thereof for the hearing of motions on July 31, 1956. Upon the argument of said motion on that date, with the consent of defendant's counsel, plaintiff moved

for and obtained leave to amend her complaint so as to bring it in the name of the personal representative of the decedent and setting forth an additional cause of action based on the terms of the "Convention For The Unification of Certain Rules Relating to International Transportation by Air" (49 Stat. Part 2, p. 3000 et seq.), commonly called the "Warsaw Convention". Subsequently, in a decision handed down on August 22, 1956, Judge Cashin granted defendant's motion dismissing the complaint on the grounds that this Court does not have jurisdiction of the subject matter of the suit as a civil action. In the meantime, Harry Norman Ball, Esq., one of the several attorneys representing the plaintiff herein, served a formal written amended complaint by mail from his office in Philadelphia on August 21, 1956. A copy of said amended complaint was received by defendant's attorneys on August 22, 1956, the date of Judge Cashin's decision.

A copy of said amended complaint so served by mail and a copy of Judge Cashin's decision will be submitted to the court upon the return date of this motion.

It is respectfully submitted that, having amended her pleading once upon the argument of the motion before Judge Cashin, plaintiff had no right to amend her complaint a second time without permission of the court as she attempted to do with the service of said amended complaint on August 21, 1956.

(27)

It is further respectfully submitted that all of the issues raised in the said amended complaint so served on August 21, 1956, were resolved against plaintiff in Judge Cashin's decision and that they are, therefore, *res adjudicata*.

Affidavit of William J. Junkerman

WHEREFORE, for all the reasons stated above defendant respectfully requests an order dismissing the amended complaint served on August 21, 1956.

WILLIAM J. JUNKERMAN

(Sworn to September 13, 1956.)

Affidavit Contra Defendant's Motion to Dismiss the Amended Complaint

(55)

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 110-388

(Jury trial demanded)

RUTH M. NOEL and WM. H. FRANTZ, Executors of the Estate of Marshal L. Noel, Deceased,

Plaintiffs,

—against—

LINEA AEROPOSTAL VENEZOLANA,

Defendant.

Commonwealth of Pennsylvania,
County of Philadelphia—ss.:

MORRIS L. WEISBERG, being duly sworn, deposes and says as follows:

I am an attorney at law and am associated with Harry Norman Ball, Esq., 1010 Packard Building, Philadelphia,

Affidavit Contra Defendant's Motion to Dismiss the Amended Complaint

I'a., one of the attorneys for plaintiffs in the above-entitled action, and as such I am familiar with all the pleadings and proceedings heretofore had herein. I make this affidavit contra defendant's motion to dismiss the amended complaint.

Defendant moved to dismiss the complaint filed herein upon the ground that this Court lacks jurisdiction of such suit brought as a civil jury action and upon the (55a) further ground that such suit may only be brought by the personal representative of the decedent in a District Court of the United States, in admiralty for the exclusive benefit of decedent's next of kin. This motion came on to be heard before Honorable John M. Cashin, at a stated Term thereof for the hearing of motions on July 31, 1956.

The complaint filed herein names Ruth Noel as plaintiff, the widow of decedent. Paragraph 4 of the complaint alleges that:

> "The death of [Marshal L. Noel] was caused by the wrongful acts, neglect, default, and *wilful misconduct* of defendant, its servants, agents and employes in the construction, design, maintenance and/or operation of the said aircraft." (Emphasis supplied.)

The allegation of "wilful misconduct" was based upon the Warsaw Convention.

Upon the argument of defendant's motion to dismiss the complaint on July 31, 1956, I pointed out that defendant in filing such motion had deliberately ignored the grounding of the complaint not solely upon the Death on the High Seas Act but, in addition, upon the International Treaty. I requested the Court's permission to amend the complaint so as to allege specifically a cause of action under the Warsaw Convention and, in addition, to change the parties plaintiff from Ruth Noel alone to (56) Ruth

Affidavit Contra Defendant's Motion to Dismiss the Amended Complaint

Noel and Wm. H. Frantz, the executors of the Estate of Marshal L. Noel, Deceased, named on July 27, 1956 in the Bergen County Court (Probate Division) in New Jersey. The Court declined to grant leave to amend at that time. Counsel for defendant, William J. Junkerman, Esq., waived objection to the defect in party plaintiff but took the position that no possible amendment could cure the alleged jurisdictional defect, including an amendment asserting a cause of action under the Warsaw Convention.

Upon the said argument, Honorable John M. Cashin inquired whether I desired to file a brief or affidavit and I informed the Court that I did. Counsel for defendant requested leave to file a reply brief since the contention based upon the Warsaw Convention was in his view a new contention.

On August 6, 1956, I sent to Honorable John M. Cashin and to counsel for defendant copies of "Memorandum and Affidavit Contra Defendant's Motion to Dismiss the Complaint". In the affidavit referred to I stated that:

> "Plaintiff intends to file forthwith an amended complaint as, of course, under Federal Rule 15(a). Such amended complaint will specifically refer to the Warsaw Convention and not merely utilize the phrase 'wilful misconduct'.
>
> "The amended complaint will allege that (57) it is brought under the Federal Death on the High Seas Act (46 U. S. C. § 761) and in the alternative, that it is brought under the Warsaw Convention (49 Stat. 3000).
>
> • • • •
>
> "Ruth M. Noel and Wm. H. Frantz, Executors of the Estate of Marshal L. Noel, Deceased, will be the parties plaintiff in the amended complaint, and both the statutory and treaty causes of action will be asserted by them."

Affidavit Contra Defendant's Motion to Dismiss the Amended Compiaint

At page 27 of the "Memorandum and Affidavit Contra Defendant's Motion to Dismiss the Complaint" which I filed with the Honorable John M. Cashin I argued the proposition: "Plaintiff has an absolute right to amend the complaint", stating that: "If any doubt existed, therefore, that the instant complaint is bottomed not only on the federal statute, but, in addition, upon the treaty of the United States (Warsaw Convention) plaintiff would have an absolute right to amend to allege a cause of action under the treaty, which cause of action is not confined to the admiralty forum".

On August 21, 1956 I sent to Douglas B. Bowring, Esq., of counsel for defendant (Certified Mail No. 770250) a copy of the amended complaint herein with a letter stating that the amended complaint was "being filed with the Clerk".

(58)

On August 20, 1956 I sent 2 copies of the amended complaint to Aaron Lipper, Esq., with instructions to file the amended complaint with the Clerk and to leave a copy at Hon. John M. Cashin's Chambers.

I was only informed on September 24, 1956 that a messenger from Mr. Lipper's office had failed to file the amended complaint and to leave a copy at Hon. John M. Cashin's Chambers, when said messenger was advised by someone in Hon. John M. Cashin's Chambers that an Order had been filed in the case.

On September 25, 1956, a copy of the amended complaint was filed with the Clerk of the Court.

It is respectfully submitted that the recital in the Order of September 19, 1956 signed by Judge Cashin that "plaintiff, upon the argument of said motion having amended her complaint with the consent of defendant's counsel, and the court having considered such amendment as a part of

plaintiff's opposition to said motion thereon" does not entirely accord with the facts. No amendment is of record, and as Judge Cashin's Opinion notes, leave only was sought to amend. Judge Cashin's Opinion was based upon the *assumption* that the complaint was amended generally as stated and would appear to be a decision on the allegations of the complaint as amended as stated. (59) The order should probably be resettled to include the specific content of the amendment contemplated by plaintiff and assumed by Judge Cashin.

The amended complaint herein is in three counts. All of the counts include an allegation that the decedent died in the airspace above the ocean.

The first count invokes the jurisdiction of this Court upon the ground of diversity as in *Higa* v. *Transocean Airlines*, 124 F. Supp. 13, 14: "Plaintiff relies on the diversity clause as a procedural device for his action at law and bases his substantive rights upon the Death on the High Seas Act, citing among others *Sierra* v. *Pan American World Airways, Inc.*, B. C. Puerto Rico, 107 F. Supp. 519 and *Elliott* v. *Steinfeldt*, 254 App Div. 739, 4 N. Y. S. 2nd 9. ***" See the *Sierra* case, supra, holding that substantive rights and liabilities of the parties were governed by the Death on the High Seas Act, but not the remedial rights, and that the substantive rights and liabilities were not required to be enforced in admiralty.

The second count is based remedially and substantively upon the Death on the High Seas Act.

(60)

The third count is based upon the rights granted by the Convention.

/s/ Morris L. Weisberg
Morris L. Weisberg

(Sworn to and subscribed October 3, 1956.)

Reply Affidavit of William J. Junkerman

(41)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 110-388

RUTH NOEL,

Plaintiff,

—against—

LINEA AEROPOSTAL VENEZOLANA,

Defendant.

RUTH M. NOEL and WM. H. FRANTZ, Executors of the Estate of Marshal L. Noel, Deceased,

Plaintiffs,

—against—

LINEA AEROPOSTAL VENEZOLANA,

Defendant.

State of New York,
County of New York—ss.:

WILLIAM J. JUNKERMAN, being duly sworn, deposes and says:

I make this affidavit in reply to the affidavit of Morris L. Weisberg sworn to the 3rd day of October, 1956, in opposition to defendant's motion to dismiss the amended complaint herein. Plaintiff's attorneys have blown hot

and cold with respect to their position before this Court ever since the oral argument on July 31, 1956. At the time of that oral argument plaintiff's attorneys acknowledged a defect in the complaint in that the suit was not brought by the personal representative of the decedent. However, they pointed out that executors had been appointed and deponent (42) thereupon consented that the complaint be deemed amended to show that fact. Plaintiff's counsel then argued that plaintiff's cause of action was not limited to admiralty jurisdiction because the Warsaw Convention created a cause of action at law in plaintiff's favor. He asked permission to amend the complaint to allege that it was based upon the Warsaw Convention as well as upon the Federal Death on the High Seas Act. Deponent argued that the flight as an international flight was governed by the Warsaw Convention but that changing the allegations of the complaint to specifically so allege would make absolutely no difference on the determination of the motion. The court thereupon directed that briefs be submitted on what effect, if any, the Warsaw Convention would have upon the question of dismissal of the complaint. Plaintiff's attorneys were given a week in which to submit a memorandum of law on the subject and defendant's attorneys were given three days in which to reply thereto. Plaintiff's attorneys served and filed their memorandum of law on or about August 7, 1956, and defendant's attorneys served and filed their reply memorandum on or about August 10, 1956. In these memoranda of law, both sides argued on the assumption that the complaint had, in fact, been amended to include the provisions of the Warsaw Convention and they argued the merits of the question. Thereafter, this Court handed down its decision on August 22, 1956.

At no time prior to the court's decision did plaintiff's attorneys actually serve or file any written amended

complaint. Apparently, on August 21, 1956, Harry Norman Ball, Esq., one of plaintiff's attorneys, in (43) Philadelphia, mailed a letter enclosing a copy of the amended complaint to defendant's attorneys. This was received in defendant's attorneys' office sometime on August 22, 1956. Plaintiff's attorneys apparently did not call said amended complaint to the attention of the court nor file it with the clerk of the court until September 25, 1956—almost a week after judgment was entered dismissing plaintiff's complaint.

It is respectfully submitted that the amended complaint to which this motion is directed is a nullity since the original complaint was amended once as a matter of course upon the oral argument of the motion on July 31, 1956, and no permission was thereafter given either by the court or by stipulation of the parties for the service of a second amended complaint. That this Court fully accepted plaintiff's oral amendment upon the oral argument of the motion on July 31, 1956, is evidenced by Judge Cashin's decision, which reads in part as follows:

> "Assuming the complaint to be amended as requested, the plaintiff argues that the cause of action under the Federal Death on the High Seas Act may be brought as a civil action and that the Warsaw Convention creates a separate cause of action which may be brought as a civil action.
>
> • • • •
>
> The question remains as to whether the Warsaw Convention creates a new cause of action and whether any such newly created cause of action may be brought as a civil action in the District Court. While there was at first some doubt as to whether the Convention was self-executing to any

extent (*Choy* v. *Pan American*, supra), there is no doubt at this time that, at least insofar as the Convention creates a rebuttal presumption of liability upon the happening of the accident (Article 17) and a limitation thereof except upon the showing of wilful misconduct (Article 25) that it is self-executing. * * *"

(44) The court thereafter thoroughly considered the recognized authorities on the subject and came to the conclusion that "Nowhere in the Convention is there any language which can be read to assure any of the advantages sought by the plaintiff." After the court's decision defendant prepared a proposed order and served it with notice of settlement on September 5, 1956. Plaintiff's attorneys thereupon served and filed a counter order with notice of settlement on the following day which was identical with the order submitted by defendant's attorneys except for the fact that plaintiff's proposed order omitted the words: "without prejudice to plaintiff's right to institute a suit in admiralty against defendant within the time limited by law." In the recital part of said order prepared and submitted by plaintiff's counsel, there is the following statement: "and plaintiff, upon the argument of said motion, having amended her complaint with the consent of defendant's counsel, and the court having consided such amendment as part of plaintiff's opposition to said motion, and due deliberation having been had thereon, and the court having made and filed its decision on August 22, 1956, * * *".

On September 7, 1956, Morris L. Weisberg, Esq., one of plaintiff's counsel, attended an official interview of Lt. Cmdr. Frederick J. Hancox at the United States Coast Guard offices at 80 Lafayette Street, New York City. At the conclusion of that hearing Mr. Weisberg

indicated to deponent that he would withdraw the amended complaint so served by mail. Subsequently, on September 11, 1956, deponent called Mr. Weisberg in Philadelphia and in the telephone conversation Mr. Weisberg advised deponent that he would sign a stipulation withdrawing the amended complaint. (45) Deponent thereupon prepared such a stipulation, signed five copies of the same and mailed them to Mr. Weisberg in a special delivery letter. A copy of said letter of transmittal is hereto annexed and marked Exhibit "A". The following day deponent received a telephone call from Mr. Weisberg in Philadelphia in which the latter was evasive about signing the stipulation. He indicated that he thought it better to wait until the court signed one of the orders submitted to it. Deponent then requested that Mr. Weisberg send him a stipulation not later than September 13th extending defendant's time to answer or move with respect to said amended complaint lest such a motion subsequently be deemed necessary to clarify the confused status presented by such service. This Mr. Weisberg declined to do. Accordingly, on September 13th defendant served the motion now before the court. On the following day deponent received a letter from Harry Norman Ball, Esq., advising that plaintiff's attorneys were withdrawing the proposed order which they had submitted on September 6th and enclosing another proposed order on Judge Cashin's decision.

WHEREFORE, deponent respectfully requests that defendant's motion for an order dismissing the amended complaint be granted.

WILLIAM J. JUNKERMAN

(Sworn to October 8, 1956.)

EXHIBIT "A", ANNEXED TO REPLY AFFIDAVIT OF WILLIAM J. JUNKERMAN

(46)

COPY

HAIGHT, GARDNER, POOR & HAVENS

80 Broad Street
New York 4, N. Y.

September 11, 1956

SPECIAL DELIVERY

Morris L. Weisberg, Esq.
Law Offices of Harry Norman Ball
1010 Packard Building
15th and Chestnut Streets
Philadelphia 2, Pa.

Noel & Frantz v. *L. A. V.*
Our file 2957-1C

Dear Mr. Weisberg:

Confirming our telephone conversation of this afternoon in which it was agreed that the formal written amended complaint which you served by mail from Philadelphia on August 21, 1956, is to be withdrawn, I am enclosing herewith five copies of stipulation withdrawing said amended complaint with the understanding that you will have it signed by Harry Norman Ball, Esq., and Joseph G. Feldman, Esq., and then mail it to the firm of Lipper, Shinn & Keeley, in New York City, so that they may also sign the stipulation. When it has been signed by all parties will you kindly see than an original and one copy is returned to me. I will then have the original filed in court and retain one copy for our records.

Very truly yours,

WILLIAM J. JUNKERMAN

WJJ:MD
Enc.

LIBRARY
SUPREME COURT, U.S.

No. 6001

FILED
NOV 7 1951
JOHN T. FEY, Clerk

United States Court of Appeals

For the Second Circuit

RUTH M. NOEL and WM. H. FRANTZ, Executors of the Estate of MARSHAL L. NOEL, Deceased,

Plaintiffs-Appellants,

against

LINEA AEROPOSTAL VENEZOLANA,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

APPENDIX TO APPELLANTS' BRIEF

HARRY NORMAN BALL,
JOSEPH G. FELDMAN,
1010 Packard Building,
Philadelphia 2, Pa.
and
LIPPER, SHINN & KEELEY,
521 Fifth Avenue,
New York 17, N. Y.
Attorneys for Plaintiffs-Appellants.

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United States Court of Appeals

For the Second Circuit

Civ. 110-388

[SAME TITLE]

Docket Entries

[A]

ATTORNEYS

For Plaintiff:

HARRY NORMAN BALL

JOSEPH G. FELDMAN,
10th & Chestnut Sts., Phila. Pa.

AARON LIPPER
527 5th Ave. (17)
MU 2-5780

For Defendant:

HAIGHT GARDNER POOR & HAVENS
80 Broad St. (4)

BASIS OF ACTION: Personal Injury—Death

Trial by Jury by pltf. 6-28-56

Date	Account	Received	Disbursed
6/28/56	A. Lipper	15—	
6/29/56	Pd N G Tuss		15—
12-26-56	L. S. & K.	5—	
12-27-56	Pov. S. Tsy		5—

Docket Entries

Date	Filings—Proceedings	Attorneys Plf.	Attorneys Deft.
June 28-56	Filed complaint and issued summons		
July 2-56	Filed Order granting pltf. leave to serve notice of examination of Jose Mendoza, Jose R. Roncajolo & Anthony Prago. Weinfeld, J.	x	
July 25-56	Filed Notice of Motion to dismiss (with copy of complaint attached) Ret. 7-31-56		x
Aug. 1-56	Filed summons and return. Served deft. on 7-9-56		
Aug. 22-56	Filed Opinion #22,887 Motion to dismiss granted. Settle order, Cashin, J.		
Sept. 19-56	Filed Pltf's unsigned order.		
Sept. 19-56	Filed Pltf's copy of unsigned order.		
Sept. 19-56	Filed Pltff's unsigned order.		
Sept. 14-56	" Notice of Motion to dismiss amended complaint—Ret. 9-25-56		x
Sept. 19-56	" Order dismissing complaint without prejudice to pltf's right to institute a suit in admiralty, Cashin, J.—Judgment entered. Mailed Notice of Entry 9-20-56		

Docket Entries

Date	Filings—Proceedings	Attorneys Pltf.	Attorneys Deft.
Sept. 25-56	" Amended Complaint (see admission of service on back dated 8-21-56)		
[B]			
Nov. 30-56	Filed Opinion No. 23,064 granting deft's motion to dismiss 2nd amended complaint, Cashin, J. Mailed notice of entry 11-30-56		
Sept. 27-56	Memo End. on Motion filed 9-14-56: Referred to Judge Cashin, Edelstein, J.		
Nov. 30-56	Filed Reply affdvt. in opposition to deft's motion to dismiss amended complaint.		x
Nov. 30-56	Filed supplemental affdvt.		x
Dec. 26-56	Filed Notice of Appeal. Mailed copy to Haight Gardner Poor & Havens		

A True Copy

ROBERT A. CHARISON, Clerk
RAOUL BRUGO, Deputy Clerk

[SEAL]

Order Appealed From

[37] UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. 110-388

RUTH M. NOEL and WM. H. FRANTZ, Executors of the Estate of MARSHAL L. NOEL, Deceased,

Plaintiffs,

against

LINEA AEROPOSTAL VENEZOLANA,

Defendant.

• • •

[40] Defendant's Motion to dismiss the complaint on the ground that the Court does not have jurisdiction of the subject matter of the suit as a civil action is granted.

Dated: New York, New York
November 29, 1956

JOHN M. CASHIN
U. S. D. C.

Complaint

[1] IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

$15.—

Civil Action No. 110-388

Jury Trial demanded

RUTH NOEL

vs.

LINEA AEROPOSTAL VENEZOLANA

---

1. At the times and places herein mentioned the defendant, LINEA AEROPOSTAL VENEZOLANA, was and now is a common carrier by air, operating aircraft for transportation of passengers, mail and baggage for hire, and was operating under a certificate of the Civil Aeronautics Board of the United States Government, to provide international air transport service.

2. On or about June 19, 1956, MARSHAL L. NOEL was a fare-paying passenger of defendant from New York, N. Y., to Caracas, Venezuela, on a 4-engine Super Constellation aircraft owned, operated and controlled by defendant

through its servants, agents or employes in the course of employment, designated as Flight 253, which departed from Idlewild Airport, New York, on or about 11:15 P. M. o'clock Tuesday, June 19, 1956.

3. Defendant failed to safely convey the said MARSHAL L. NOEL from New York to Caracas, but, on the contrary, on or about Wednesday, June 20, 1956, at or about 4:30 A. M. o'clock, the said Marshal L. Noel died while on board the said aircraft, en route from New York to Caracas, when the aircraft crashed into the ocean.

4. The death was caused by the wrongful acts, neglect, default, and wilful misconduct of defendant, its servants, agents and employes in the construction, design, maintenance and/or operation of the said aircraft.

5. The said Marshal L. Noel died a resident of Ridgewood, New Jersey, and left surviving him the following:

[2] His widow—Ruth Noel;

His minor daughter—Patricia Noel;

His minor daughter—Sharon Noel;

His minor daughter—Marcia Noel.

6. This action is brought under the Act of March 30, 1920, 41 Stat. 537 (46 U. S. C. §761).

7. By reason of the foregoing, the said plaintiff RUTH NOEL has been damaged in the sum of $3,000,000.

WHEREFORE, plaintiff requests judgment against the defendant in the sum of THREE MILLION ($3,000,000) DOLLARS, together with costs.

s/ HARRY NORMAN BALL
Harry Norman Ball

1010 Packard Building
Philadelphia 2, Pa.

s/ JOSEPH G. FELDMAN
Joseph G. Feldman

s/ LIPPER, SHINN & KEELEY
By AARON LIPPER

The above attorneys, not having an office in the Southern Division or Eastern District of New York, do hereby designate LIPPER, SHINN & KEELEY, at 527 Fifth Avenue, New York 17, N. Y., for the purpose of service of all papers.

s/ HARRY NORMAN BALL
Harry Norman Ball

s/ JOSEPH G. FELDMAN
Joseph G. Feldman

LIPPER, SHINN & KEELEY

By: s/ AARON LIPPER
Aaron Lipper
Attorneys for Plaintiff

Notice of Motion to Dismiss Complaint

[7] UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

Sirs:

PLEASE TAKE NOTICE that upon the complaint herein, the defendant will move this Court at a Stated Term thereof for the hearing of motions to be held in Room 506 of the United States Court House at Foley Square in the Borough of Manhattan, County, City and State of New York, on the 31st day of July, 1956, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard for an order pursuant to Rule 12 of the Rules of Civil Procedure.

(1) Dismissing the complaint herein upon the ground that it purports to assert a claim for damages for wrongful death under the Federal Death on the High Seas Act, 41 Stat. 537, 46 USC 761, and that this Court lacks jurisdiction over the subject matter of such suit brought as a civil jury action, and upon the further ground that such a suit may only be brought by the personal representative of the decedent in a district court of the United States, in [8] admiralty, for the exclusive benefit of the decedent's next of kin; and

(2) Granting such other and further relief as to the court may seem just and proper.

Dated: New York, N. Y., July 25, 1956.

Notice of Motion to Dismiss Complaint

Yours, etc.,

HAIGHT, GARDNER, POOR & HAVENS,
Attorneys for Defendant,
80 Broad Street,
New York 4, N. Y.

To:

LIPPER, SHINN & KEELEY, ESQS.,
Attorneys for Plaintiff,
527 Fifth Avenue,
New York 17, N. Y.

Opinion No. 22,887 Granting Motion to Dismiss Complaint

[11] UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

[SAME TITLE]

HARRY NORMAN BALL, ESQ.,
JOSEPH G. FELDMAN, ESQ.,
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DOUGLAS B. BOWRING, ESQ.,
MAURICE L. NOYER, ESQ.,
Of Counsel.

CASHIN, JOHN M., *U. S. D. J.*

Opinion No. 22,887 Granting Motion to Dismiss Complaint

[12] CASHIN, *D. J.*

Marshal L. Noel was a passenger on an aircraft, owned and operated by the defendant, enroute from New York, N. Y. to Caracas, Venezuela, when the aircraft crashed into the ocean causing his death. His widow brought the present suit as a civil action under the Federal Death On The High Seas Act (41 Stat. 537, 46 USC §§761-767) for death resulting from the wrongful acts, neglects, default and wilful misconduct of the defendant. (Although the complaint does not so state, it is assumed, for the purpose of this motion, that the occurrence giving rise to the action took place, as it must under the Federal Death On The High Seas Act, more than one marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States.) The present motion seeks dismissal of the complaint on the ground that the Court lacks jurisdiction of the subject matter of the suit brought as a civil action and, on the further ground, that the widow is not the proper party plaintiff since the suit must be brought by the personal representative of the decedent.

With the consent of defendant's counsel, the plaintiff, at the argument of the motion, cross-moved for leave to file an amended complaint in the name of the personal representatives of the decedent who had been appointed since the filing of the original complaint setting forth an additional cause of action based [13] on the terms of the "Convention For The Unification of Certain Rules Relating to International Transportation By Air" (49 Stat Part 2, p. 3000, et seq.), commonly called the "Warsaw Convention".

Assuming the complaint to be amended as requested, the plaintiff argues that the cause of action under the

Opinion No. 22,887 Granting Motion to Dismiss Complaint

Federal Death On The High Seas Act may be brought as a civil action and that the Warsaw Convention creates a separate cause of action which may be brought as a civil action. Considering first the question of the proper forum for an action based on the Death On The High Seas Act, the Court does not consider the argument of the plaintiff sound. It is true that authority can be found in this and other districts for the proposition that the statute makes available to a suitor the civil forum (See e.g. *Choy* v. *Pan American Airways, Inc.*, 1941 A. M. C. 483 (S. D. N. Y.); *Batkiewicz* v. *Seas Shipping Co., Inc.*, 53 F. Supp. 802 (S. D. N. Y. 1943); *Sierra* v. *Pan American World Airways, Inc.*, 107 F. Supp. 519 (D. P. R. 1952)). However, more recent cases are to the contrary. *Iafrate* v. *Compagnie Generale Transatlantique*, 106 F. Supp. 619 (S. D. N. Y. 1952); *Wilson* v. *Transocean Airlines*, 121 F. Supp. 85 (N. D. Cal. 1954); *Higa* v. *Transocean Airlines*, 124 F. Supp. 13 (D. Hawaii 1954), affd. 230 F. 2d 780 (CA 9, 1955). The reasoning in the latter cases is that since no cause of action existed under the general maritime law for wrongful death on the high seas (*The Harrisburg*, 119 US 199) a statutory enactment was necessary to create such a cause of action. When the applicable statute [14] utilized the words "* * * may maintain a suit * * * in admiralty * * *", the admiralty forum was made exclusive. With this reasoning the Court agrees.

The question remains as to whether the Warsaw Convention creates a new cause of action and whether any such newly created cause of action may be brought as a civil action in the District Court. While there was at first some doubt as to whether the Convention was self-executing to any extent (*Choy* v. *Pan American, supra*), there is no doubt at this time that, at least insofar as the Convention creates a rebuttable presumption of liability upon the hap-

pening of the accident (Article 17) and a limitation thereof except upon the showing of wilful misconduct (Article 25) that it is self-executing. Virtually all of the reported cases have not considered the question at issue, apparently because the application of the *lex loci delicti*, with the addition of the Convention presumption and limitation mentioned above, afforded the same rights and liabilities as if a separate cause of action were created. It is obvious, however, that the Convention intended to leave much to the law of the forum (cf. Articles 21, 25(1), 28(2) and 29(2)). There has come to the attention of the Court only three reported cases which considered the instant question—two of these are in the New York State Court and the holdings are contradictory—*Wyman* v. *Pan American Airways, Inc.*, 181 Misc. 963; affd. 267 App. Div. 947; affd. 293 N. Y. 878, Cert. den. 324 U. S. 882 holding that [15] no separate cause of action was created by the Convention, and *Salamon* v. *Koninklijke Luchtvaart Maatschappij, N. Y.*, 107 N. Y. S. 2d 768; affd. 281 App. Div. 965; leave to appeal denied 282 App. Div. 683; reargument denied 282 App. Div. 837, holding that one was. It is not necessary, however, for the Court to consider which of these holdings is sound since the Court of Appeals for the Second Circuit has settled the issue in the case of *Komlos* v. *Compagnie Nationale Air France*, 209 F. 2d 436 (1953).

The accident giving rise to the Komlos suit occurred on the Island of San Miguel, Azores, Republic of Portugal. The Convention concededly was applicable. Decedent's mother received a notice of compensation award from the Insurance Company. Subsequently both the Insurance Company and the decedent's sister, as administratrix of his estate, instituted suit based on the wrongful death. The District Court for the Southern District of New York (111 F. Supp. 393 (S. D. N. Y. 1952)) held that the Warsaw

Opinion No. 22,887 Granting Motion to Dismiss Complaint

Convention applied but that it created no substantive cause of action, at least so long as the *lex loci delicti* provided such a cause (pp. 401-402) and that the cause of action was assigned, by operation of New York law, to the Insurance carrier because suit had not been instituted by the beneficiary of the compensation award within the time limited. The Court of Appeals reversed the latter holding on the ground that the Portugese law allows the collection of "moral damages", a concept unknown to [16] law of New York. This portion of the cause of action, it was held, could not have been intended to be assigned, as a matter of New York law, to the Insurance Company. To avoid splitting a cause of action it was held that the entire cause should be brought by the Administratrix. It was thus clearly held that the *lex loci delicti* was to be applied by the District Court even though the Warsaw Convention was applicable.

It should be noted that the ends the plaintiffs seek to gain by utilizing the civil rather than the admiralty side of the Court are (1) a jury trial; (2) broader discovery proceedings, and (3) the probability of a less expensive litigation proceeding. It is not contended that the admiralty forum would deny to the plaintiffs their substantive cause of action for wrongful death. Nowhere in the Convention is there any language which can be read to assure any of the advantages sought by the plaintiff.

The motion to dismiss the complaint on the grounds that the Court does not have jurisdiction of the subject matter of the suit as a civil action, is granted. Settle order on notice.

Dated: New York, N. Y., August 22nd, 1956.

JOHN M. CASHIN,
United States District Judge.

Amended Complaint

[32] IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 110/388

(Jury Trial Demanded)

RUTH M. NOEL and WM. H. FRANTZ, Executors of the Estate of MARSHAL L. NOEL, Deceased,

Plaintiffs,

against

LINEA AEROPOSTAL VENEZOLANA,

Defendant.

FIRST COUNT

1. Plaintiff Wm. H. Frantz, one of the Executors of the Estate of Marshal L. Noel, Deceased, is a citizen of the Commonwealth of Pennsylvania. Ruth M. Noel, the other executor of the said Estate, is a citizen of the State of New Jersey. Defendant is a corporation or entity owned by the United States of Venezuela. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars.

2. At all times hereafter mentioned defendant was a scheduled air carrier operating outside the continental limits of the United States under an air carrier operating certificate issued by the Civil Aeronautics Board of the

United States of America, and subject to the regulations of the said Civil Aeronautics Board.

3. On or about June 19, 1956, Marshal L. Noel was a fare paying passenger of defendant on an international flight from New York, New York, United States of America to Caracas, United States of Venezuela, on an aircraft owned and operated and controlled by defendant through its servants, agents and employes in the [33] course of their employment, designated as Flight 253, which departed Idlewild Airport, New York, New York, United States of America on or about 11:15 P. M. o'clock June 19, 1956, bound for the United States of Venezuela.

4. Defendant failed to safely transport the said Marshal L. Noel, his baggage and personal effects, from the United States of America to the United States of Venezuela. On the contrary, on or about June 20, 1956, at or about 1:30 A. M. o'clock, the said Marshal L. Noel died while on board the said aircraft which was then in the airspace above the Atlantic Ocean at a point approximately 30 miles from Asbury Park, New Jersey, United States of America.

5. The death of the said Marshal L. Noel and the loss of his baggage and personal effects was caused by the wrongful acts, neglect and default of defendant, its servants, agents and employes in the designing, constructing, equipping, checking, maintaining, repairing and/or operating of the said aircraft.

6. The said Marshal L. Noel left him surviving his widow Ruth M. Noel and his minor children Patricia Noel, Sharon Noel and Marcia Noel.

7. On July 27, 1956, in the Probate Division, Bergen County Court, New Jersey, the last will and testament of

Marshal L. Noel was admitted to probate, and letters testamentary issued to Wm. H. Frantz as Surviving Executor and to Ruth M. Noel, Substitute Executrix.

8. By reason of the foregoing, plaintiffs have been damaged in the sum of Three Million ($3,000,000.) Dollars.

[34] SECOND COUNT

9. Plaintiffs repeat and reallege as part of this claim, each and all the allegations contained in paragraphs 1, 2, 3, 4, 5, 6, and 8 of the First Count of this Complaint, with like effect as if herein fully repeated.

10. This claim is brought under the Federal Death on the High Seas Act of March 30, 1920, 41 Stat. 537 (46 U. S. C. Sec. 761).

THIRD COUNT

11. Plaintiffs repeat and reallege, as part of this claim, each and all the allegations contained in paragraphs 1, 2, 3, 4, 6, 7 and 8 of the First Count of this Complaint, with like effect as if herein fully repeated.

12. This claim is brought under the "Convention for Unification of Certain Rules Relating to International Carriage by Air" signed at Warsaw, Poland, October 12, 1929, commonly known as the "Warsaw Convention", to which the United States of America adhered on October 29, 1934 (49 Stat. 3000) and to which the United States of Venezuela adhered in 1956. The authentic and official text of the Warsaw Convention is in the French language.

13. Article 25 of the Warsaw Convention provides that:

> "(1) Le transporteur n'aura pas le droit de se prévaloir des dispositions de la présente Convention

qui excluent ou limitent sa responsabilité, si le dommage provient de son dol ou d'une faute qui, d'après la loi tribunal saisi, est considérée comme équivalente au dol.

(2) Ce droit lui sera également refusé si le dommage a été cause dans les mêmes conditions par un de ses préposés agissant dans l'exercise de ses fonctions."

[35] Article 25 appears in translation in 49 Stat. 3000 as follows:

"(1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his wilful misconduct, or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct.

(2) Similarly, the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment."

14. The language "* * * *dol ou d'une faute qui, d'après la loi du tribunal saisi, est considérée comme équivalente au dol*", means acts or omissions which, in accordance with the law to be applied by the court having jurisdiction over the case, constitute gross negligence, wilful misconduct, recklessness, an act committed without regard for the consequences, and or a conscious breach of a rule established for the purpose of protecting the safety of passengers, of their personal effects and baggage.

Amended Complaint

15. The death of the said Marshal L. Noel and the loss of his personal effects and baggage were caused by acts and omissions of defendant, its agents, servants and employes, which, in accordance with Article 25 of the Warsaw Convention and the law of the United States District Court for the Southern District of New York, constituted gross negligence, wilful misconduct, recklessness, acts committed without regard for the consequences, and/or conscious breaches of rules established for the purpose of protecting the safety of [36] passengers, of their personal effects and baggage—in the designing, construct ag, equipping, checking, repairing, maintaining and/or operating of the said aircraft.

WHEREFORE, plaintiffs request judgment against defendant in the sum of Three Million ($3,000,000.) Dollars, together with costs.

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Philadelphia 2, Pa.

HARRY NORMAN BALL
JOSEPH G. FELDMAN

By: s/ HARRY NORMAN BALL
Attorneys for Plaintiffs

The above attorneys, not having an office in the Southern Division of New York, do hereby designate Lipper, Shinn & Keeley, at 527 Fifth Avenue, New York 17, N. Y., for the purpose of service of all papers.

HARRY NORMAN BALL

JOSEPH G. FELDMAN

LIPPER, SHINN & KEELEY
By: s/ AARON LIPPER

Notice of Motion to Dismiss Amended Complaint

[23] UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 110-388

RUTH NOEL,

Plaintiff,

against

LINEA AEROPOSTAL VENEZOLANA,

Defendant.

Sirs:

PLEASE TAKE NOTICE that the defendant will move this Court at a Stated Term thereof for the hearing of motions, to be held in Room 506 of the United States Court House at Foley Square in the Borough of Manhattan, County, City and State of New York, on the 25th day of September, 1956, at 10:00 o'clock in the forenoon of that day or as soon thereafter as counsel can be heard, for an order,

(1) Dismissing the amended complaint herein bearing the caption:

Notice of Motion to Dismiss Amended Complaint

"In the

UNITED STATES DISTRICT COURT

For the Southern District of New York

Civil Action No. 110-338

(Jury Trial Demanded)

Ruth M. Noel and Wm. H. Frantz, Executors of the Estate of Marshal L. Noel, Deceased,

Plaintiffs,

against

Linea Aeropostal Venezolana,

Defendant."

---

pursuant to Rule 12 of the Rules of Civil Procedure upon the ground that this Court lacks jurisdiction over the subject matter of such a suit brought as a civil jury action.

• • •

Memorandum Referring Motion to Judge Cashin

[28] Sept. 27th 1956

Respectfully referred to Judge Cashin at the request of counsel.

David Edelstein,
U. S. D. J.

Opinion No. 23064 Granting Defendant's Motion to Dismiss Amended Complaint

[37] UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civ. 110-388

RUTH M. NOEL and WM. H. FRANTZ, Executors of the Estate of MARSHAL L. NOEL, Deceased,

Plaintiffs,

against

LINEA AEROPOSTAL VENEZOLANA,

Defendant.

MEMORANDUM

HARRY NORMAN BALL, ESQ.,
JOSEPH G. FELDMAN, ESQ.,
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80 Broad Street,
New York 4, N. Y.

WILLIAM J. JUNKERMAN, ESQ.,
DOUGLAS B. BOWRING, ESQ.,
Of Counsel.

CASHIN, JOHN M., *U. S. D. J.*

Opinion No. 23064 Granting Defendant's Motion to Dismiss Amended Complaint

[38] CASHIN, *D. J.*

This is an application to dismiss the plaintiffs' second amended complaint on the ground that the Court lacks civil jurisdiction over the subject matter. The original complaint in this action, as amended on oral argument, was dismissed by this Court on August 22, 1956, on the ground that the Court lacked civil jurisdiction over the subject matter.

On this motion defendant also raises what we consider well-founded objections to the plaintiffs' mode of procedure. However, in the interest of expediting this action, we will consider the plaintiffs' complaint as now amended.

Plaintiffs' original complaint, as amended on oral argument of defendant's original motion to dismiss, alleged two claims for damages for the death of a passenger on an aircraft owned and operated by the defendant, enroute from New York, N. Y. to Caracas, Venezuela, it being alleged that the aircraft crashed into the ocean, causing the passenger's death. The first claim for damages was based on the Federal Death on the High Seas Act (41 Stat. 537, 46 USC §§761-767). The second was based on the "Warsaw Convention".

The Court dismissed the first amended complaint [39] (Cashin, J., Opinion dated August 22, 1956) on the ground that the Federal Death on the High Seas Act, supra, did not give the plaintiffs a civil cause of action but did give them a cause of action in admiralty and, therefore, no cause of action under the "Warsaw Convention".

The complaint now before the Court contains one new or different allegation in that it is now alleged that the decedent passenger died while on board defendant's aircraft, which was then in the airspace above the Atlantic Ocean at a point approximately thirty miles from Asbury Park, New Jersey. Plaintiffs now contend that this allegation places their case outside the admiralty jurisdiction

of the Court and gives them the right to bring an action on the civil side under the "Warsaw Convention".

Neither authority (*Wyman* v. *Pan American Airways, Inc.*, 181 Misc. 963; affd. 267 App. Div. 947; affd. 293 N. Y. 878, cert. den. 324 U. S. 882; *Choy* v. *Pan American Airways, Inc.*, 1941 A. M. C. 483 (S. D. N. Y.)), the language of the Statute nor the dictates of common sense sustain a holding that the fulfillment of the jurisdictional requirements of the Federal Death on the High Seas Act is to be governed by the determination of such an elusive fact as whether a person died above, on or in the sea.

We, therefore, do not think plaintiffs' additional [40] or new allegation distinguishes their complaint from its predecessor and so we adhere to our original decision. Defendant's motion to dismiss the complaint on the grounds that the Court does not have jurisdiction of the subject matter of the suit as a civil action, is granted.

Dated: New York, N. Y.
November 29th, 1956.

JOHN M. CASHIN,
United States District Judge.

Notice of Appeal

[50] UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Civil Action No. 110-388

RUTH NOEL,

Plaintiff.

against

LINEA AEROPOSTAL VENEZOLANA,

Defendant.

Civil Action No. 110-388

RUTH M. NOEL and WM. H. FRANTZ, Executors of the Estate of MARSHAL L. NOEL, Deceased,

Plaintiffs,

against

LINEA AEROPOSTAL VENEZOLANA,

Defendant.

NOTICE IS HEREBY GIVEN that Ruth Noel (Ruth M. Noel) and Wm. H. Frantz, plaintiffs above-named, hereby appeal

Notice of Appeal

to the United States Court of Appeals for the Second Circuit from the order filed in this action on November 29, 1956.

527 Fifth Ave.
New York 17, N. Y.

s/ Aaron Lipper
For Lipper, Shinn & Keeley

s/ Harry Norman Ball
Harry Norman Ball

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Philadelphia 2, Pa.

s/ Joseph G. Feldman
Joseph G. Feldman

To: Haight, Gardner, Poor & Havens, Esqs.
80 Broad Street
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Attorneys for the Defendant

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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

Term. No. 600

RUTH M. NOEL and WM. H. FRANTZ, Executors of the Estate of MARSHAL L. NOEL, Deceased,
Petitioners,

v.

LINEA AEROPOSTAL VENEZOLANA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

HARRY NORMAN BALL,
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IN THE

SUPREME COURT OF THE UNITED STATES.

Term. No.

RUTH M. NOEL and WM. H. FRANTZ, Executors of the Estate of MARSHAL L. NOEL, Deceased,

Petitioners,

v.

LINEA AEROPOSTAL VENEZOLANA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in the above captioned case.

CITATIONS TO OPINIONS BELOW.

The opinion of the District Court, reported in 144 F. Supp. 359, is printed in Appendix B hereto, *infra*. The opinion of the Court of Appeals, reported in 247 F. 2d 677, is printed in Appendix B hereto, *infra*.

JURISDICTION.

The judgment of the Court of Appeals for the Second Circuit was made and entered on August 9, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

QUESTION PRESENTED.

Whether the Warsaw Convention, a treaty of the United States, creates an independent cause of action against the air carrier for death incurred on board an international flight.

TREATY INVOLVED.

The treaty involved in this case is the Warsaw Convention, 49 STAT. 3000, Article 17 of which provides:

> "The carrier shall be liable for damages sustained in the event of the death or wounding of a passenger or

any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking."

The Warsaw Convention in its entirety is printed in Appendix A hereto, *infra*, at p. 14.

STATEMENT OF THE CASE.

Petitioners' decedent died while a passenger on respondent's aircraft on a flight from New York City to Venezuela. Petitioners brought suit for $3,000,000 on the law side of the District Court for the Southern District of New York, alleging in their complaint that decedent died while the airplane was in the airspace above the Atlantic Ocean at a point approximately 30 miles from Asbury Park, New Jersey, as a result of respondent's gross negligence, willful misconduct and recklessness.

Three counts are set forth in Petitioners' complaint: (1) a diversity action, (2) an action under the Death on the High Seas Act, and (3) an action under the Warsaw Convention. The jurisdiction of the District Court was invoked because of diversity of citizenship in count one, because the action was based on a statute of the United States in count two, and because the action was based on a treaty of the United States in count three. The District Court dismissed all three counts of the complaint on the grounds that suit under the Death on the High Seas Act may be brought only in admiralty if at all in this case, and that no independent cause of action is created by the Warsaw Convention. The Court of Appeals for the Second Circuit affirmed the District Court. This petition for certiorari follows.

REASONS FOR GRANTING THE WRIT.

I. The Court below has disregarded the terms of the Warsaw Convention, a Treaty of the United States, which creates an independent cause of action for international flights.

An entire scheme of liability with all the attributes of an independent cause of action is set up by Chapter III of the Warsaw Convention, entitled "*Liability of the Carrier,*" Article 17 of which provides for the basic cause of action, stating—

> "*The carrier shall be liable for damages* sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking." (Emphasis added.)

Succeeding Articles of Chapter III establish limitations and procedures for enforcement of the basic liability, providing for: (1) The carrier's bearing the burden of proof of showing its own freedom from negligence;[1] (2) The affirmative defense of contributory negligence;[2] (3) A limitation of the carrier's liability to approximately $8,300 unless the passenger can prove willful misconduct by the carrier;[3] (4) application of the *lex fori* to determine which persons have the right to maintain the action for damages and what the respective rights of these persons are;[4] (5) A survival action

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[1] WARSAW CONVENTION, Article 20 (1).

[2] Id., Article 21.

[3] Id., Articles 22 (1) and 25.

[4] Id., Article 24 (2).

against the estate of the person liable in case of his death;[5] (6) Rules of venue;[6] (7) Application of the rules of procedure of the forum;[7] and (8) a two year period of limitations.[8]

Each of these rules which define and explain the basic liability has in turn been given effect by the courts, *e. g.*, (1) The $8,300 limitation on the carrier's liability in *Grey v. American Airlines, Inc.*, 227 F. 2d 282 (2d Cir. 1955); (2) The venue rules in *Berner v. United Airlines*, 149 N. Y. S. 2d 335 (Sup. Ct. N. Y. County), *affirmed* 157 N. Y. S. 2d 884 (App. Div. 1st Dep't 1956); (3) The affirmative defense of contributory negligence in *Chutter v. KLM Royal Dutch Airlines*, 132 F. Supp. 611 (S. D. N. Y. 1955); and (4) The two year period of limitations in the *Chutter* case, *supra*. Logic demands that if the procedural aspects of Chapter III be sustained, effect also be given to the substantive rights created there.

Assuming, *pro arguendo*, that the language of Article 17 is ambiguous in relation to the creation of an independent cause of action, Article 27 is unequivocal in its creation of a survival action in case of the death of the person originally liable.

> "In the case of the death of the person liable, *an action for damages lies* in accordance with the terms of this convention against those legally representing his estate." (Emphasis added.)

It seems inconceivable that the drafters of the convention would provide for a cause of action against the estate of the tort feasor and not against the tort feasor himself.

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[5] Id., Article 27.

[6] Id., Article 28 (1).

[7] Id., Article 28 (2).

[8] Id., Article 29.

II. The decision of the Court below will have the far reaching effect of making the vast number of international air travellers potential victims of a situation in which they will be left without a remedy for injury or death, regardless of how flagrant the misconduct of the air carrier may be.

If the holding that the Warsaw Convention does not create an independent cause of action is sustained, a great void will be left in the law wherein the families of the tens of thousands of American passengers on international flights may be left without a remedy for death sustained as a result of negligence by the air carrier no matter how flagrant that negligence may be. In the first place, the carrier would be absolved from liability whenever the death occurs where there is no *lex loci delicti* providing for a wrongful death action, as for example where death of a passenger occurs when a plane crashes into a territory which has no statute creating a wrongful death action, even though that territory may adhere to the Warsaw Convention. Secondly, the carrier would be absolved from liability whenever the death occurs in an obscure place, near the border of two countries and the wreckage is not found, as for example in a jungle or mountainous region. In such a case, even assuming both countries have statutes creating wrongful death actions, the carrier could block an action for wrongful death under the statute of either country by forcing the plaintiff to prove that the death did not occur in the other country.

Two possible remedies—one under the Death on the High Seas Act,[9] the other under the Warsaw Convention—were available to petitioners in the instant case for decedent's death, which they allege to have happened in the air space above the Atlantic Ocean at a point approximately 30 miles from Asbury Park, New Jersey. It is axiomatic that no

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[9] 41 STAT. 537, 46 U. S. C. §761 **et seq.** (1920).

action for wrongful death lies at common law[10] and it has been held that state death statutes have no application to deaths incurred beyond the territorial waters of the state.[11] The opinion of the court below in effect bars petitioners from both of these actions, leaving them remediless even with respect to the $8,300 to which the Convention says they are entitled merely upon proof that decedent died on board an international flight. And under the allegations of petitioners' complaint, which for purposes of this petition must be assumed to be true,[12] petitioners were damaged in the sum of $3,000,000 as a result of respondent's gross negligence, willful misconduct and recklessness. The holding of the court below is in direct contradiction of Article 17 of the Warsaw Convention, part of the supreme law of the land,[13] which proclaims that—"*The carrier shall be liable for damages*" if the decedent died while on board an international flight.

Said the court below—"Thus, regardless of whether the Federal Death on the High Seas Act provides a remedy, Article 17 does not."[14] With respect to the right of action under the Death on the High Seas Act the court below stated that the extension of that statute to death incurred in the air space above the ocean "raises grave constitutional questions as to the permissible scope of admiralty jurisdiction,"[15] at the same time holding that such cause of action

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[10] **See, Wilson v. Transocean Airlines,** 121 F. Supp. 85, 87 (N. D. Cal. 1954).

[11] **Wilson v. Transocean Airlines,** 121 F. Supp. 85, 87-91 (N. D. Cal. 1954).

[12] **American Universal Ins. Co. v. Sterling,** 203 F. 2d 159, 163 (3d Cir. 1953).

[13] CONSTITUTION, Article VI, Clause 2; see also, **Asakura v. City of Seattle,** 265 U. S. 332, 341 (1924).

[14] Opinion of Court of Appeals in instant case, Appendix B, 247 F. 2d 680.

[15] Opinion of Court of Appeals in instant case, Appendix B, 247 F. 2d 680, n. 4.

would not be cognizable on the law side of the court, under the wording of the Act.[16]

Therefore, the court below has in effect included the vast area above the oceans of the world in the category of *loci delicti* with no law creating a cause of action for wrongful death, precluding recovery for wrongful death in the air space above the ocean, and giving the air carrier the additional out of putting plaintiffs to the task of proving that decedents died on the ocean rather than in the air space above it, a virtually impossible task, where, as is most often the case, the plane disappears without a trace.

III. The purpose of the Warsaw Convention—uniform regulation of the liability of international air carriers—would be defeated unless the Convention is held to create an independent cause of action.

"The advantage of regulating in a uniform manner the conditions of international transportation by air in respect . . . of the liability of the carrier,"[17] stated in the Warsaw Convention to be its primary purpose, would be defeated almost entirely if the holding of the court below that the convention does not create a cause of action is sustained.

If there were an explosion on an airplane over the water killing some of the passengers, and the remainder of the passengers were killed when the plane, as a result of the

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[16] The pertinent part of the Death on the High Seas Act reads:

"That whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent **may** maintain a suit for damages in the district courts of the United States, **in admiralty**. . . . (41 STAT. 537, 46 U. S. C. §761 (1920)). (Emphasis added.)

[17] WARSAW CONVENTION, preamble.

explosion, crashed into a territory having a cause of action for wrongful death, the first group of passengers would have no cause of action and the second group would have a cause of action for deaths caused by the same act on the part of the carrier. It is not conceivable that where the convention says "The carrier shall be liable for damages,"[18] it was intended that liability would depend on the chance that the local law would provide a remedy.

IV. The balance which the framers of the Warsaw Convention sought to strike between the rights of the carrier and the passengers would be seriously upset to the detriment of the passengers by a holding that the Convention creates no cause of action.

The framers of the Warsaw Convention intended to have the Convention strike a balance between the rights of the carriers, on one hand, to encourage, what at that time was an infant industry, and the rights of the passengers, on the other hand, to make up for the rights which were given to the carrier.[19] Secretary of State Hull, in his letter to the President, dated March 31, 1934, recommending the adherence of the United States to the Warsaw Convention, wrote—

> "It will be observed that while under the terms of the convention passengers and shippers acquire certain definite rights in international air transportation, the aerial carriers obtain the benefit of a limitation of liability."[20]

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[18] **Id.**, Article 17.

[19] **See Berner v. United Airlines, Inc.**, 149 N. Y. S. 2d 335, 342 (Sup. Ct. N. Y. County 1956), aff'd 157 N. Y. S. 2d 884 (App. Div. 1st Dep't 1956).

[20] [1934] U. S. Av. R. 240, 243.

The carriers gained the following advantages at the Convention: Unless willful misconduct is proved by the plaintiff, the liability of the carrier is limited to approximately $8,300 for the death or injury of each passenger. The impact of this limitation on liability is recognized only when it is remembered that direct proof of willful misconduct is absent in most air accidents, because in the vast majority of cases all the eye witnesses are killed.

The passenger, on the other hand, gained the following advantages: He is entitled to recovery of up to approximately $8,300 for death or personal injury without being put to the task of proving negligence by the carrier. However, that this is a real advantage is doubtful in light of the cases which have held that where an airplane disappears without a trace, an action for negligence lies against the carrier based on the theory of *res ipsa loquitur*.[21] Jurisdiction over the air carrier exists at the place where the carrier has a place of business, through which the ticket was bought, regardless of whether the carrier is doing business there or not. However, if the passenger has no cause of action, these so called advantages amount to nothing. But the carrier's limitation of liability will operate in its favor in every suit against the carrier.

V. While this Court has never ruled on the question, there is some judicial authority for the proposition that Article 17 creates a cause of action.

Neither this court, nor for that matter any court, before the decision in the instant case has squarely held that the Warsaw Convention creates no independent cause of action. On the other hand, there is authority holding that the Warsaw Convention creates a cause of action.

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[21] **E. g., Haasman v. Pacific Alaska Air Express**, 100 F. Supp. 1 (D. Alaska 1951), **aff'd sub nom., Des Maris v. Beckman**, 198 F. 2d 550 (9th Cir. 1952).

In *Salamon v. Koninklijke Luchtvaart Maatschappij, N. V.*, 107 N. Y. S. 2d 768 (Sup. Ct. N. Y. County 1951), *affirmed* 281 App. Div. 965, 120 N. Y. S. 2d 917 (1st Dep't 1953),[22] the Supreme Court of New York held that Article 17 of the Warsaw Convention created a cause of action for injury or death on board international airflights covered by the convention. The holding is based on the wording of the treaty and on two earlier New York cases in which it was held that the Treaty was self executing, requiring no implementation, and that the Treaty overrides and supplants local law.

In *Komlos v. Compagnie Nationale Air France*, 111 F. Supp. 393 (S. D. N. Y. 1952), *reversed on other grounds* 209 F. 2d 436 (2d Cir. 1953), *cert. denied* 348 U. S. 820 (1954), the District Court for the Southern District of New York stated by way of dictum that: (1) If the locus delicti has no wrongful death action, the forum of a state adhering to the treaty could allow a suit under Article 17 of the Treaty, and "under those circumstances it might be said that Article 17 created the right of action for wrongful death," And (2) if the locus delicti adheres to the Convention but otherwise has no action for wrongful death, a forum of the locus delicti could allow suit under Article 17 of the Convention.[23] Under the facts presented to it in the *Komlos* case the District Court held that since the lex loci delicti provided a cause of action for wrongful death, it was not necessary to resort to Article 17.

In *Choy v. Pan-American Airways Company*, 1 Am. Mar. Cas. 483 (S. D. N. Y. 1941), the District Court for the Southern District of New York held that an action could not be brought under Article 17 of the Convention since there was no enabling act implementing the Convention, at the same

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[22] Cited with approval in **Berner v. United Airlines, Inc.**, 149 N. Y. S. 2d 335, 342-3 (Sup. Ct. N. Y. County 1956), **aff'd** 157 N. Y. S. 2d 884 (App. Div. 1st Dep't 1956).

[23] **Komlos** case at page 402.

time indicating that it felt Article 17 except for the absence of implementation created a cause of action.[24] Cases since the *Choy* case have consistently held various parts of the Warsaw Convention to be self executing.[25]

The court below in the instant case, without relying on lack of implementation for a reason, held that Article 17 of the Convention does not create a cause of action because the language of that Article does not purport to create a cause of action. In this decision the court below stands completely alone.[26]

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[24] The court in the **Choy** case although denying plaintiff the right to bring his action under Article 17 of the Warsaw Convention, allowed suit on the civil side of the District Court under the Death on the High Seas Act, on the ground that the language of that Act—"may maintain a suit for damages in the district courts of the United States, in admiralty" (41 STAT. 537, 46 U. S. C. §761 (1920))—did not restrict suit to the admiralty forum.

[25] **Indemnity Insurance Company of North America v. Pan American Airways, Inc.**, 58 F. Supp. 338 (S. D. N. Y. 1944); see **Grey, Berner,** and **Chutter** cases cited **supra.**

[26] **But c. f., Supino v. Compagnie Nationale Air France,** 100 F. Supp. 214 (E. D. N. Y. 1951), wherein the parties conceded that the Warsaw Convention did not create a cause of action. In this case the air crash was in Portuguese territory and plaintiff was relying on Portuguese law so the issue was not presented to the court. And **Wyman v. Pan American Airways, Inc.**, 181 Misc. 963, 43 N. Y. S. 2d 420 (Sup. Ct. N. Y. County 1943), **aff'd without opinion** 267 App. Div. 947, 48 N. Y. S. 2d 459 (1st Dep't), **aff'd without opinion** 293 N. Y. 878, 59 N. E. 2d 785 (1944), **cert. denied** 324 U. S. 882 (1945), wherein the court said in relation to the question of whether plaintiff was entitled to interest on his judgment—"No new substantive rights were created by the Warsaw Convention. . . . (at 423). Plaintiff argued that the Convention did **not** apply in order to escape the $8300 limitation.

CONCLUSION.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

WARSAW CONVENTION

(49 Stat. 3000 *et seq.*)

Convention and additional protocol between the United States of America and other powers relating to International Air Transportation. Concluded at Warsaw, October 12, 1929; adherence advised by the Senate, with reservation, June 15, 1934; adherence declared by the President with reservation, June 27, 1934; declaration of adherence of the United States deposited at Warsaw, July 31, 1934; proclaimed, October 29, 1934.

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA.

A PROCLAMATION.

WHEREAS a convention for the unification of certain rules relating to international transportation by air and an additional protocol thereto relating to Article 2 of the convention, were signed at Warsaw by the respective plenipotentiaries of certain countries, the originals of which convention and additional protocol, done at Warsaw, in the French language, October 12, 1929, and left open for signature until January 31, 1930, are word for word as follows:

[French Text Omitted]

Translation

CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO INTERNATIONAL TRANSPORTATION BY AIR

THE PRESIDENT OF THE GERMAN REICH * * *

* * * * *

Having recognized the advantage of regulating in a uniform manner the conditions of international transportation by air in respect of the documents used for such transportation and of the liability of the carrier,

Have nominated to this end their respective Plenipotentiaries, who, being thereto duly authorized, have concluded and signed the following convention:

CHAPTER I. SCOPE—DEFINITIONS

Article 1

(1) This convention shall apply to all international transportation of persons, baggage, or goods performed by aircraft for hire. It shall apply equally to gratuitous transportation by aircraft performed by an air transportation enterprise.

(2) For the purposes of this convention the expression "international transportation" shall mean any transportation in which, according to the contract made by the parties, the place of departure and the place of destination, whether or not there be a break in the transportation or a transshipment, are situated either within the territories of two High Contracting Parties, or within the territory of a single High Contracting Party, if there is an agreed stopping place within a territory subject to the sovereignty, suzerainty, mandate or authority of another power, even though that power is not a party to this convention. Transportation without such an agreed stopping place between territories subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party shall not be deemed to be international for the purposes of this convention.

(3) Transportation to be performed by several successive air carriers shall be deemed, for the purposes of this

convention, to be one undivided transportation, if it has been regarded by the parties as a single operation, whether it has been agreed upon under the form of a single contract or of a series of contracts, and it shall not lose its international character merely because one contract or a series of contracts is to be performed entirely within a territory subject to the sovereignty, suzerainty, mandate, or authority of the same High Contracting Party.

Article 2

(1) This convention shall apply to transportation performed by the state or by legal entities constituted under public law provided it falls within the conditions laid down in article 1.

(2) This convention shall not apply to transportation performed under the terms of any international postal convention.

CHAPTER II. TRANSPORTATION DOCUMENTS

SECTION I—PASSENGER TICKET

Article 3

(1) For the transportation of passengers the carrier must deliver a passenger ticket which shall contain the following particulars:

(*a*) The place and date of issue;

(*b*) The place of departure and of destination;

(*c*) The agreed stopping places, provided that the carrier may reserve the right to alter the stopping places in case of necessity, and that if he exercises that right, the alteration shall not have the effect of depriving the transportation of its international character;

(*d*) The name and address of the carrier or carriers;

(*e*) A statement that the transportation is subject to the rules relating to liability established by this convention.

(2) The absence, irregularity, or loss of the passenger ticket shall not affect the existence or the validity of the contract of transportation, which shall none the less be subject to the rules of this convention. Nevertheless, if the carrier accepts a passenger without a passenger ticket having been delivered he shall not be entitled to avail himself of those provisions of this convention which exclude or limit his liability.

* * * * *

CHAPTER III. LIABILITY OF THE CARRIER

Article 17

The carrier shall be liable for damages sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

Article 18

(1) The carrier shall be liable for damage sustained in the event of the destruction or loss of, or of damage to, any checked baggage or any goods, if the occurrence which caused the damage so sustained took place during the transportation by air.

(2) The transportation by air within the meaning of the preceding paragraph shall comprise the period during which

the baggage or goods are in charge of the carrier, whether in an airport or on board an aircraft, or, in the case of a landing outside an airport, in any place whatsoever.

(3) The period of the transportation by air shall not extend to any transportation by land, by sea, or by river performed outside an airport. If, however, such transportation takes place in the performance of a contract for transportation by air, for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the transportation by air.

Article 19

The carrier shall be liable for damage occasioned by delay in the transportation by air of passengers, baggage, or goods.

Article 20

(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

(2) In the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft, or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage.

Article 21

If the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the court may, in accordance with the provisions of its own law, exonerate the carrier wholly or partly from his liability.

Article 22

(1) In the transportation of passengers the liability of the carrier for each passenger shall be limited to the sum of 125,000 francs. Where, in accordance with the law of the court to which the case is submitted, damages may be awarded in the form of periodical payments, the equivalent capital value of the said payments shall not exceed 125,000 francs. Nevertheless, by special contract, the carrier and the passenger may agree to a higher limit of liability.

(2) In the transportation of checked baggage and of goods, the liability of the carrier shall be limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that that sum is greater than the actual value to the consignor at delivery.

(3) As regards objects of which the passenger takes charge himself the liability of the carrier shall be limited to 5,000 francs per passenger.

(4) The sums mentioned above shall be deemed to refer to the French franc consisting of 65½ milligrams of gold at the standard of fineness of nine hundred thousandths. These sums may be converted into any national currency in round figures.

Article 23

Any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this convention shall be null and void, but the nullity of any such provision shall not involve the nullity of the whole contract, which shall remain subject to the provisions of this convention.

Article 24

(1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.

(2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights.

Article 25

(1) The carrier shall not be entitled to avail himself of the provisions of this convention which exclude or limit his liability, if the damage is caused by his willful misconduct or by such default on his part as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to willful misconduct.

(2) Similarly the carrier shall not be entitled to avail himself of the said provisions, if the damage is caused under the same circumstances by any agent of the carrier acting within the scope of his employment.

Article 26

(1) Receipt by the person entitled to the delivery of baggage or goods without complaint shall be *prima facie* evidence that the same have been delivered in good condition and in accordance with the document of transportation.

(2) In case of damage, the person entitled to delivery must complain to the carrier forthwith after the discovery of the damage, and at the latest, within 3 days from the date of receipt in the case of baggage and 7 days from the date of receipt in the case of goods. In case of delay the complaint must be made at the latest within 14 days from the date on which the baggage or goods have been placed at his disposal.

(3) Every complaint must be made in writing upon the document of transportation or by separate notice in writing dispatched within the times aforesaid.

(4) Failing complaint within the times aforesaid, no action shall lie against the carrier, save in the case of fraud on his part.

Article 27

In the case of the death of the person liable, an action for damages lies in accordance with the terms of this convention against those legally representing his estate.

Article 28

(1) An action for damages must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the court of the domicile of the carrier or of his principal place of business, or where he has a place of business through which the contract has been made, or before the court at the place of destination.

(2) Questions of procedure shall be governed by the law of the court to which the case is submitted.

Article 29

(1) The right to damages shall be extinguished if an action is not brought within 2 years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the transportation stopped.

(2) The method of calculating the period of limitation shall be determined by the law of the court to which the case is submitted.

Article 30

(1) In the case of transportation to be performed by various successive carriers and falling within the definition set out in the third paragraph of article 1, each carrier who accepts passengers, baggage or goods shall be subject to the rules set out in this convention, and shall be deemed to be one of the contracting parties to the contract of transportation insofar as the contract deals with that part of the transportation which is performed under his supervision.

(2) In the case of transportation of this nature, the passenger or his representative can take action only against the carrier who performed the transportation during which the accident or the delay occurred, save in the case where, by express agreement, the first carrier has assumed liability for the whole journey.

(3) As regards baggage or goods, the passenger or consignor shall have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery shall have a right of action against the last carrier, and further, each may take action against the carrier who performed the transportation during which the destruction, loss, damages, or delay took place. These carriers shall be jointly and severally liable to the passenger or to the consignor or consignee.

Chapter IV. Provisions Relating to Combined Transportation

Article 31

(1) In the case of combined transportation performed partly by air and partly by any other mode of transportation, the provisions of this convention shall apply only to the transportation by air, provided that the transportation by air falls within the terms of article 1.

(2) Nothing in this convention shall prevent the parties in the case of combined transportation from inserting in the document of air transportation conditions relating to other modes of transportation, provided that the provisions of this convention are observed as regards the transportation by air.

Chapter V. General and Final Provisions

Article 32

Any clause contained in the contract and all special agreements entered into before the damage occurred by which the parties purport to infringe the rules laid down by this convention, whether by deciding the law to be applied, or by altering the rules as to jurisdiction, shall be null and void. Nevertheless for the transportation of goods arbitration clauses shall be allowed, subject to this convention, if the arbitration is to take place within one of the jurisdictions referred to in the first paragraph of article 28.

Article 33

Nothing contained in this convention shall prevent the carrier either from refusing to enter into any contract of transportation or from making regulations which do not conflict with the provisions of this convention.

Article 34

This convention shall not apply to international transportation by air performed by way of experimental trial by air navigation enterprises with the view to the establishment of regular lines of air navigation, nor shall it apply to transportation performed in extraordinary circumstances outside the normal scope of an air carrier's business.

Article 35

The expression "days" when used in this convention means current days, not working days.

Article 36

This convention is drawn up in French in a single copy which shall remain deposited in the archives of the Ministry for Foreign Affairs of Poland and of which one duly certified copy shall be sent by the Polish Government to the Government of each of the High Contracting Parties.

Article 37

(1) This convention shall be ratified. The instruments of ratification shall be deposited in the archives of the Ministry for Foreign Affairs of Poland, which shall give notice of the deposit to the Government of each of the High Contracting Parties.

(2) As soon as this convention shall have been ratified by five of the High Contracting Parties it shall come into force as between them on the ninetieth day after the deposit of the fifth ratification. Thereafter it shall come into force between the High Contracting Parties which shall have ratified and the High Contracting Party which deposits its instrument of ratification on the ninetieth day after the deposit.

(3) It shall be the duty of the Government of the Republic of Poland to notify the Government of each of the High Contracting Parties of the date on which this convention comes into force as well as the date of the deposit of each ratification.

Article 38

(1) This convention shall, after it has come into force, remain open for adherence by any state.

(2) The adherence shall be effected by a notification addressed to the Government of the Republic of Poland, which shall inform the Government of each of the High Contracting Parties thereof.

(3) The adherence shall take effect as from the ninetieth day after the notification made to the Government of the Republic of Poland.

Article 39

(1) Any one of the High Contracting Parties may denounce this convention by a notification addressed to the Government of the Republic of Poland, which shall at once inform the Government of each of the High Contracting Parties.

(2) Denunciation shall take effect six months after the notification of denunciation, and shall operate only as regards the party which shall have proceeded to denunciation.

Article 40

(1) Any High Contracting Party may, at th e time of signature or of deposit of ratification or of adherence, declare that the acceptance wihch it gives to this convention does not apply to all or any of its colonies, protectorates, territories under mandate, or any other territory subject to its sovereignty or its authority, or any other territory under its suzerainty.

(2) Accordingly any High Contracting Party may subsequently adhere separately in the name of all or any of its colonies, protectorates, territories under mandate, or any other territory subject to its sovereignty or to its authority or any other territory under its suzerainty which have been thus excluded by its original declaration.

(3) Any High Contracting Party may denounce this convention, in accordance with its provisions, separately or for all or any of its colonies, protectorates, territories under mandate, or any other territory subject to its sovereignty or to its authority, or any other territory under its suzerainty.

Article 41

Any High Contracting Party shall be entitled not earlier than two years after the coming into force of this convention to call for the assembling of a new international conference in order to consider any improvements which may be made in this convention. To this end it will communicate with the Government of the French Republic which will take the necessary measures to make preparations for such conference.

This convention, done at Warsaw on October 12, 1929, shall remain open for signature until January 31, 1930.

* * * * *

SUPREME COURT, U.S.

FILED

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JOHN T. FEY, Cl

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 600

RUTH M. NOEL and WM. H. FRANTZ, Executors of the Estate of Marshal L. Noel, Deceased,

Petitioners,

—against—

LINEA AEROPOSTAL VENEZOLANA,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Statement

Petitioners, plaintiffs below, seek a writ of certiorari to review a judgment of the United States Court of Appeals for the Second Circuit, which affirmed the dismissal of an amended complaint by the United States District Court for the Southern District of New York but without prejudice to plaintiffs' right to transfer the case to the admiralty side of the court for the adjudication of the second of three counts of the amended complaint.

Plaintiffs' original complaint, as amended on the oral argument of defendant's first motion to dismiss,

alleged two claims for damages for the death of their decedent. It alleged that Marshal L. Noel, while a passenger on board an aircraft owned and operated by the defendant en route from New York to Caracas, died "when the aircraft crashed into the ocean." The first claim for damages was based on the Federal Death on the High Seas Act (41 Stat. 537, 46 U. S. C. 761). The second was based on the Warsaw Convention (49 Stat. 3000). The United States District Court for the Southern District of New York dismissed this original complaint for lack of jurisdiction of the subject matter on the grounds that (1) actions under the Federal Death on the High Seas Act are cognizable only in admiralty, and (2) the Warsaw Convention does not create an independent right of action. 144 F. Supp. 359.

Plaintiffs then amended their complaint again and this time alleged that "the said Marshal L. Noel died while on board the said aircraft which was then in the airspace above the Atlantic Ocean at a point approximately thirty miles from Asbury Park, New Jersey." This second amended complaint contained three counts. The first count was apparently based upon New York law, the second upon the Federal Death on the High Seas Act, and the third on the Warsaw Convention. Defendant's motion to dismiss this second amended complaint was granted by Judge Cashin, who ruled that there should be no material difference between deaths in, on or above the water and who, therefore, adhered to his original decision. 154 F. Supp. 162.

The Court of Appeals affirmed the dismissal of this amended complaint, "but without prejudice to plain-

tiffs' right to transfer the case to the admiralty side of the court for adjudication of the second count of the amended complaint." 247 F. 2d 677.

Argument

Although petitioners advanced and argued several points of law in the court below (including their point that a suit under the Federal Death on the High Seas Act may be brought as a civil jury action), on their application to this Court they have presented only one question, to-wit:

> "Whether the Warsaw Convention, a treaty of the United States, creates an independent cause of action against the air carrier for death incurred on board an international flight."

In opposing the present petition for certiorari, respondent respectfully urges the following points:

1. The judgment of the Court of Appeals sought to be reviewed is not a final judgment on the merits and the issue involved is not of such fundamental importance as to warrant review by this Court.

2. Article 17 of the Warsaw Convention creates a presumption of liability in the event of the death or wounding of a passenger in international transportation but, as the Court of Appeals correctly ruled, it did not create an independent right of action.

3. The only cases on the point decided by the federal courts hold that the Warsaw Convention does not create a cause of action, and this is clear from the language of the Convention itself.

POINT I

The judgment of the Court of Appeals sought to be reviewed is not a final judgment on the merits and the issue involved is not of such fundamental importance as to warrant review by this Court.

In dismissing the original complaint wherein the plaintiffs alleged that their decedent died when the aircraft crashed into the ocean, Judge Cashin, United States District Judge for the Southern District of New York, did so "without prejudice to plaintiff's right to institute a suit in admiralty against defendant within the time limited by law." In affirming the dismissal of the second amended complaint the Court of Appeals did not finally determine the rights of the parties; it merely determined (1) that the first and third counts in plaintiffs' second amended complaint were insufficient as a matter of law in that each was predicated upon a *lex loci delicti* that did not exist. As to the second count, the Court of Appeals pointed out that plaintiffs' procedural steps were wrong in bringing it on the law side of the court and the dismissal of this count was affirmed without prejudice to plaintiffs' right to transfer it to the admiralty side of the court.

That this Court has power to review a non-final judgment in a proper case is unquestioned, but as Mr. Justice Gray stated in an opinion which has been adhered to consistently since 1893,

> "* * * Clearly, therefore, this court should not issue a writ of *certiorari* to review a decree of the Circuit Court of Appeals on appeal from an

> interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause.
>
> * * * Doubtless, this power would seldom be exercised before final judgment in the Circuit Court of Appeals, and very rarely indeed before the case was ready for decision upon the merits in that court. * * *" *Amer. Const. Co.* v. *Jacksonville Railway,* 148 U. S. 372, 384-385.

As Judge Cashin pointed out in his decision dismissing the first amended complaint, the ends that plaintiffs sought to gain by using the civil rather than the admiralty side of the court were "(1) a jury trial; (2) broader discovery proceedings, and (3) the probability of a less expensive litigation proceeding. It is not contended that the admiralty forum would deny to the plaintiffs their substantive cause of action for wrongful death." 144 F. Supp. 359, 361.

POINT II

Article 17 of the Warsaw Convention creates a presumption of liability in the event of the death or wounding of a passenger in international transportation but, as the Court of Appeals correctly ruled, it does not create an independent right of action.

In Secretary of State Hull's letter to President Roosevelt, dated March 31, 1934, in which he reported to the President concerning the advisability of adherence to the Warsaw Convention (Senate document, Executive G, 73rd Cong., 2nd Sess.), he said (pp. 4, 5):

> * * *
>
> The effect of article 17 (ch. III) of the Convention is to create a presumption of liability against the aerial carrier on the mere happening of an accident occasioning injury or death of a passenger, subject to certain defenses allowed under the Convention to the aerial carrier. The burden is upon the carrier to show that the injury or death has not been the result of negligence on the part of the carrier or his agents. It is understood that while this rule has been adopted in some jurisdictions in this country in aircraft accident cases upon the theory of res ipsa loquitur, in certain other jurisdictions in this country the old common-law rule has been applied in accident cases arising in air transportation, so that the passenger or his legal representative has had the burden of proving negligence in the operation of the aircraft, before the carrier could be held liable for damages. The

principle of placing the burden on the carrier to show lack of negligence in international air transportation in order to escape liability, seems to be reasonable in view of the difficulty which a passenger has in establishing the cause of an accident in air transportation.

* * * *

The framers of the Warsaw Convention were, of course, confronted with the necessity of taking into consideration the various legal systems and practices in different countries, and in the interest of obtaining uniformity with respect to international air regulations compromises were undoubtedly necessary. On the whole, it is believed that the Convention adopted should be regarded as acceptable as a basis for regulating international transportation of passengers, baggage, and goods, and that any apparent departures from accepted procedure in this country are not sufficiently serious to warrant a withholding of adherence to the Convention.

* * * *"

As Secretary Hull pointed out, the Convention established a presumption of the carrier's liability for injuries or death of a passenger (art. 17). This is subject, however, to a limitation of the liability to 125,000 francs, equivalent in round figures to $8,300 (art. 22). This limitation can be defeated only by proof that the damage has been caused by the wilful misconduct of the carrier or his agents, or by such default as, in accordance with the law of the court to which the case is submitted, is considered to be equivalent to wilful misconduct (art. 25).

The Convention is analogous in some respects to the shipowners' limitation of liability statutes (46 U. S. C. §§ 183 *et seq.*), which limit the shipowner's liability to the value of the vessel and her pending freight in the absence of proof that the loss was caused with the privity or knowledge of the owner.

In rejecting appellants' contention in the court below that the Convention created an independent right of action, Judge Lumbard stated (Pet. 32):

> "In any event, we agree with our prior decision in *Komlos* v. *Compagnie Nationale Air France,* 209 F. 2d 436, 438 (2 Cir. 1953), which impliedly agreed with Judge Leibell's decision, *Komlos* v. *Compagnie Nationale Air France,* 111 F. Supp. 393 (S. D. N. Y. 1952), that the Convention did not create an independent right of action. As Judge Leibell pointed out, Secretary of State Hull's letter to President Roosevelt, dated March 31, 1934, indicated that the effect of Article 17 on which plaintiffs rely for their argument was only to create a presumption of liability, leaving it for local law to grant the right of action. * * *"

The case of *Wyman* v. *Pan American Airways,* 181 Misc. 963, affd. without opinion, 267 App. Div. 947, affd. without opinion, 293 N. Y. 878, cert. den. 324 U. S. 882 (1945), completely supports the proposition that the Warsaw Convention did not create a cause of action. Petitioners' footnote reference to the *Wyman* case on page 12 of their brief is entirely misleading. In the *Wyman* case the plaintiffs had failed to prove a cause of action for wilful misconduct and after both sides rested Mr. Justice Schreiber, the trial judge, directed a verdict for plaintiffs in the sum of $8300.

Thereafter, plaintiffs moved to set aside the verdict as inadequate and for a new trial. It was on this motion that Judge Schreiber wrote his opinion in the case which became an integral part of the record on appeal which was presented to the Appellate Courts of New York State and to this Court. In his opinion on the motion Mr. Justice Schreiber said (181 Misc. 963, 965-966):

> "* * * The right to bring a death action is purely statutory. It did not exist at common law (*Debevoise* v. *N. Y., L. E. & W. R. R. Co.*, 98 N. Y. 377) and depends upon the existence of a statute creating a right of action at the place where the 'force impinged' causing injuries and death. (*Whitford* v. *Panama R. R. Co.*, 23 N. Y. 465; *Kristansen* v. *Steinfeldt*, 165 Misc. 575, revd. on other grounds 256 App. Div. 824). No new substantive rights were created by the Warsaw Convention and all the rules there laid down are well within the framework of existing legal rights and remedies. (*Choy* v. *Pan-American Airways Co.*, 1941 Am. Maritime Cas. 483 [U. S. Dist. Ct., S. D. N. Y.].)
>
> The right to any recovery in this action thus must depend on some statute. The New York Decedent Estate Law (§ 130) can have no application as the injury and death did not occur within the territorial confines of the State (*Whitford* v. *Panama R. R. Co., supra*). The only possible relevant statute, therefore, is the Federal Death on the High Seas Act (U. S. Code, tit. 46, § 761 *et seq.*), similar in effect to other statutes giving such right of action. This statute is applicable to airplane accidents on the high seas

(*Choy* v. *Pan-American Airways Co., supra*) and that an action thereon may be maintained in the State courts has been held by the Appellate Division in this case (*Wyman* v. *Pan American Airways, Inc.*, 262 App. Div. 995). * * *"

In their petition for a writ of certiorari the plaintiffs Wyman predicated the jurisdiction of this Court to hear the appeal on the following basis (p. 5):

> "The jurisdiction of this Court is invoked under Judicial Code, Section 237, (a) and (b), United States Code, Title 28, Section 344(b). There is here involved the interpretation to be given to a Treaty of the United States of America, to wit: the Warsaw Convention, which respondent claimed granted to it a partial immunity from liability. The treaty was specifically pleaded in the answer of the respondent and was the sole basis of decision from which review is sought."

and two of the petitioners claimed "Reasons for Issuance of Writ" in the *Wyman* case were that (p. 11):

> "* * * There should be, therefore, a final authoritative disposition of the meaning and application of the Warsaw Convention with respect to the limitation of liability of common carriers engaged in international carriage by air.
>
> (2) This is the first time that the question of the applicability of the Warsaw Convention was presented to the State Court of Appeals, and if this Court grants certiorari, it will be the first time that this Court will consider the question of the meaning to be given to the Warsaw Con-

vention, particularly with respect to Articles 22 and 25, dealing with limitation of liability."

It will be seen from the foregoing that the issues involved in the appeal in the *Wyman* case involved a lot more than "whether plaintiff was entitled to interest on his judgment".

Petitioners' argument at the bottom of page 7 and top of page 8 of their petition, serves to confuse rather than to clarify the Court of Appeals decision. They go to extremes in their attempt to establish that they do not have a cause of action under the Federal Death on the High Seas Act. Yet no court or judge has so ruled in this case. In fact the converse is true. When they pleaded in their original complaint that their decedent died "when the aircraft crashed in the ocean", Judge Cashin's order dismissing their complaint as a civil jury action distinctly provided that such dismissal was "without prejudice to plaintiff's right to institute a suit in admiralty against defendant". In dismissing their second amended complaint, Judge Cashin adhered to his original decision and indicated that in his opinion, insofar as the Federal Death on the High Seas Act was concerned, it made no difference whether a person "died above, on or in the sea".*

Petitioners erroneously state at the top of page 8 of their petition that the Court of Appeals placed the "vast area above the oceans of the world in the category of *loci delicti* with no law creating a cause of action for wrongful death, precluding recovery for wrong-

* Judge Clancy had arrived at the same conclusion with respect to this point in *Choy* v. *Pan-American Airways Co.* (S. D. N. Y.), 1941 A. M. C. 483, 484.

ful death in the air space above the ocean, and giving the air carrier the additional out of putting plaintiffs to the task of proving that decedents died on the ocean rather than in the air space above it." On the contrary, the Court of Appeals distinctly left the question of the applicability of the Federal Death on the High Seas Act to a death in the air spaces above the ocean to await the outcome of the trial of that issue. Furthermore, it should be noted that in the *Wyman* case plaintiffs' testator "was lost in the disappearance without trace of that aircraft over the South Pacific Ocean". Nevertheless, the court there held that the Federal Death on the High Seas Act was the statute that gave plaintiffs the right of action. There was no attempt in the *Wyman* case to determine whether the death of plaintiffs' testator occurred on, in or over the Pacific Ocean.

The inconsistency of petitioners' argument is again demonstrated on page 10 of their petition wherein they refer to the fact that cases have held "that where an airplane disappears without a trace, an action for negligence lies against the carrier based on the theory of *res ipsa loquitur*." In support of this statement they cite in a footnote the case of *Haasman* v. *Pacific Alaska Air Express*, 100 F. Supp. 1 (D. Alaska 1951), aff'd *sub nom.*, *Des Maris* v. *Beckman*, 198 F. 2d 550 (9th Cir. 1952). It should be noted that the *Haasman* case involved a suit for the death of persons who were passengers on an airplane flight from Yakutat, Alaska, to Seattle, Washington. (It was therefore not an international flight as defined in the Warsaw Convention.) The plane was last heard from in the vicinity of Sitka. No trace of the plane, its cargo or passengers, had

ever been found. Hence, there was no way of determining that the plane had actually crashed in the territory of Alaska. In entering judgment for the plaintiffs, District Judge Folta of the United States District Court for the District of Alaska, Third Division, stated (p. 2):

> "I am of the opinion that the doctrine of res ipsa loquitur is applicable and that the motion to dismiss should be denied. * * *"

The United States Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court "on the grounds and for the reasons stated in the District Court's opinion".

Presumably the District Court and the Court of Appeals in the *Haasman* case were not troubled with either the Warsaw Convention or the *lex loci delicti* in that case and the question presented was "whether the doctrine of *res ipsa loquitur* applies where the plane disappears during flight without a trace." In holding that the doctrine did apply the District Court entered judgment for the plaintiff pursuant to a stipulation of the parties. In this connection it should be noted that in some jurisdictions *res ipsa loquitur* is considered to be a matter of substantive law whereas in others it is regarded as a matter of procedure or a procedural rule of evidence. (*Lobel* v. *American Airlines*, 192 F. 2d 217, cert. den. 342 U. S. 945).

POINT III

The only cases on the point decided by the federal courts hold that the Warsaw Convention does not create a cause of action, and this is clear from the language of the Convention itself.

In petitioners' Point V they assert that "Neither this court, nor for that matter any court, before the decision in the instant case has squarely held that the Warsaw Convention creates no independent cause of action." They then cite three cases allegedly holding that the Warsaw Convention does create a cause of action, to-wit: *Salamon* v. *Koninklijke Luchtvaart Maatschappij, N. V.*, 107 N. Y. S. 2d 768 (Sup. Ct. N. Y. Co. 1951), aff'd without opinion, 281 App. Div. 965 (First Dept. 1951); *Komlos* v. *Compagnie Nationale Air France,* 111 F. Supp. 393 (S. D. N. Y. 1952), rev'd on other grounds, 209 F. 2d 436, cert. den. 348 U. S. 820 (1954); and *Choy* v. *Pan American Airways Company,* 1941 A. M. C. 483 (S. D. N. Y. 1951). Neither the *Komlos* case nor the *Choy* case so hold. As a matter of fact in the *Choy* case, Judge Clancy dismissed the cause of action based on the Warsaw Convention.

The question of whether the Warsaw Convention created a cause of action was specifically raised and decided adversely to petitioners' contention in *Komlos* v. *Compagnie Nationale Air France, supra.* In that case, involving an airplane crash in the Azores, the defendant argued that the Warsaw Convention itself created a right of action, and that therefore the law of the place of the accident had no application.

Judge Leibell considered all of the cases in which the question had been touched upon up to that time, including *Wyman* v. *Pan American Airways, Inc., supra, Garcia* v. *Pan American Airways, Inc.*, 269 App. Div. 287, aff'd 295 N. Y. 852, cert. den. 329 U. S. 741, 274 App. Div. 996, cert. den. 338 U. S. 824, and *Salamon* v. *Koninklijke Luchtvaart Maatschappij, N. V., supra,* and came to the following conclusion (111 F. Supp. at p. 401):

> "I am of the opinion that the Warsaw Convention does not create a right of action for wrongful death. The Convention creates a *presumption* of liability from the happening of the accident. Art. 17. It gives the carrier complete exoneration from liability if the carrier can prove that it took all necessary measures to avoid the damage. It recognizes the lex fori doctrine of contributory negligence, Art. 21, assuming that under certain conditions a passenger's negligence might contribute to the damage. It grants a limitation of the liability of the carrier, Art. 22(1), to 125,000 francs (approximately $8,300) if the carrier is not entitled to exoneration from liability under Art. 20, and is not shown to be guilty of 'wilful misconduct', Art. 25, which caused the damage.
>
> That the Convention did not create any more than a presumption of liability is clear from the letter of Secretary of State Hull, dated March 31, 1934, addressed to the President, recommending the adherence of the United States to the Convention. * * *"

Judge Leibell also noted the opinion of the New York Court of Appeals in *Ross* v. *Pan American Air-*

ways, Inc. (1949), 299 N. Y. 88, in which the court, while not passing on the specific question, referred to the Convention as a treaty which "* * * regulates and limits the liability of air carriers engaged in international air transportation" (299 N. Y., at p. 91).

He therefore held that the right of action was given by Portuguese law, but that it had been assigned to the insurance carrier by operation of the New York Workmen's Compensation Law, and he therefore dismissed the action brought by the administratrix.

The Court of Appeals for the Second Circuit reversed (209 F. 2d 436), but only because it held that the Portuguese concept of "moral damages", unknown to our law, prevented the assignment of the entire cause of action; and rather than split the cause of action, it held that the whole cause could be sued upon by the administratrix.

Further support for the conclusion that the Convention was not intended to create a cause of action may be found in the language of the Convention itself. Its official title, for example, is "Convention for the Unification of Certain Rules Relating to International Transportation By Air," and not, as one would expect if petitioners' argument were correct, "Convention for the Establishment of Uniform Liability of Air Carriers engaged in International Air Transportation." The concept that the Convention deals only with certain "rules relating to" liability rather than the liability itself appears throughout: for example, in Articles 3(1)(e), 3(2), 4(3)(h), 4(4), 5(2), 8(q), 23, and 32.

In at least two other cases decided by the District Courts in the Second Circuit, it has been assumed, either explicitly (*Supino* v. *Compagnie Nationale Air*

France (E. D. N. Y., 1951), 100 F. Supp. 214, 216) or implicitly* (*Rashap* v. *American Airlines, Inc.* (S. D. N. Y., 1955), 1955 U. S. & Can. Av. R. 593) that the Convention creates no right of action. In the latter case, Judge Dawson dismissed four causes of action as having no basis in the law of Texas, where the accident occurred. Furthermore the early holdings of the *Wyman* and *Choy* cases that the Convention does not create a cause of action have been cited as stating the existing law in a note in 13 A. L. R. (2d), at p. 348, where the author states:

> "Although the liability limitations contained in the Warsaw Convention have been applied to death actions in international air transportation, it should be noted that the Convention itself is not a death statute, and that the right of action for death of a passenger over the ocean is governed by the Federal 'Death on the High Seas Act of 1920.' Wyman v. Pan American Airways, Inc., 181 Misc. 963 * * *; Choy v. Pan American Airways Co. (F DC NY) [1941] US Av 10, s. c. [1942] US Av 93."

In *Salamon* v. *Koninklijke Luchtvaart Maatschappij, N. V., supra,* Mr. Justice Hecht of the New York Supreme Court, in passing upon a motion to dismiss five causes of action based on a wrongful death, sus-

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* Other Warsaw Convention cases where the lower courts and the parties took it for granted that the *lex loci delicti* governed the right to recovery: *Pekelis* v. *T. W. A.*, 187 F. 2d 122, cert. den. 341 U. S. 951 (1951) [Law of Ireland pleaded and relied upon]; *Goepp* v. *American Overseas Airlines*, 281 App. Div. 105, 305 N. Y. 830, cert. den. 346 U. S. 874 (1953) [Law of Newfoundland pleaded and relied upon]; *Froman* v. *Pan American Airways*, 299 N. Y. 88, 284 App. Div. 935, leave to appeal den. 285 App. Div. 806, 308 N. Y. 1050, cert. den. 349 U. S. 947 (1955) [Law of Portugal pleaded and relied upon]; *Grey* v. *American Airlines*, 227 F. 2d 282, cert. den. 350 U. S. 989 (1956) [Law of Texas pleaded and relied upon].

tained two of them on the theory that the Warsaw Convention created a cause of action. 107 N. Y. S. 2d 768. On appeal the Appellate Division, First Department, affirmed Judge Hecht's decision without opinion. 281 App. Div. 965. This decision, the only one of its kind, and which is clearly contrary to the overwhelming weight of opinion, was rejected by both the District Court and the Court of Appeals in the instant case.

In commenting on the *Salamon* case in a footnote reference in the case at bar, the Court of Appeals said (Pet. 32):

> "As a matter of fact, New York law does not favor the plaintiffs. Although *Salamon* v. *Koninklijke Luchtvaart Maatschappij*, 107 N. Y. S. 2d 768 (Sup. Ct. N. Y. 1951), aff'd, 120 N. Y. S. 2d 917 (1st Dept. 1953) does hold that the Warsaw Convention creates a right of action, *Wyman* v. *Pan American Airways,* 181 Misc. 963, 43 N. Y. S. 2d 420 (Sup. Ct. N. Y. 1943), aff'd, 267 App. Div. 947, 48 N. Y. S. 2d 459 (1st Dept. 1944) holds to the contrary and the latter decision was affirmed by the New York Court of Appeals, 293 N. Y. 878, cert. denied, 324 U. S. 882 (1944)."

CONCLUSION

The petition for certiorari to the Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

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